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A CONSTITUTIONAL CROSSFIRE: STATE SOVEREIGNTY AND THE BRADY LAW

I. INTRODUCTION

The Brady Handgun Violence Prevention Act¹ requires a chief law enforcement officer to make a reasonable effort to ascertain whether the sale of a handgun to an individual violates the law.² Several recent cases have challenged the legislation as violative of the Fifth and Tenth Amendments of the Constitution.³ Of the cases decided to date, only one decision has upheld the constitutionality of the challenged statute. That decision, rendered in *Koog v. United States*,⁴ applied a distinctly different analytic approach to the question of whether Congress may pass a law mandating acts by state or local officials to implement federal regulations.⁵

The constitutional issue revisited in all Brady Act litigation is the proper balance between congressional power under the Commerce Clause of Article I,⁶ and the separation of powers guaranteed by the Tenth Amendment.⁷ The first case

1. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (partially codified in various parts of 18 U.S.C. § 922).

2. 18 U.S.C. § 922(s)(2) (1993).

A chief law enforcement officer to whom a transferor has provided notice [of a proposed handgun sale] . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General.

Id.

3. See *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

4. 852 F. Supp. 1376 (W.D. Tex. 1994).

5. Compare *Koog v. United States*, 852 F. Supp. 1376, 1381 (W.D. Tex. 1994) (aligning principles of "arguably contradictory precedents" on a continuum) with *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994) (finding the issue fully resolved by *New York v. United States*, 505 U.S. 144 (1992)).

6. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States. . . ." U.S. CONST. art. I, § 8, cl. 3.

7. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

holding the Act unconstitutional, *Printz v. United States*,⁸ placed heavy reliance on the recent decision of the Supreme Court in *New York v. United States*.⁹ "The plain text of that opinion and the logical conclusion of its analysis" sufficed to answer the question of constitutional limits on congressional power.¹⁰ A noteworthy curtailment in the scope of federal legislative authority resulted.

The *New York* holding was also important in *Koog v. United States*.¹¹ However, the court in *Koog* observed that "Supreme Court decisions about the Tenth Amendment do not reflect a pattern of straight line development of a theme."¹² Consequently, the court elected to align the "arguably contradictory precedents" on a continuum and determine where the facts of the current case would fall.¹³ The resulting survey spanned two decades of Supreme Court jurisprudence.¹⁴ Ultimately, the *Koog* court rejected a "broad reading" of *New York*, concluded that the facts more closely resembled those of *FERC v. Mississippi*,¹⁵ and held the Act consistent with the Tenth Amendment "even though it places some minimal duties upon state law enforcement officials."¹⁶

Koog offers extensive analysis of Tenth Amendment jurisprudence and, as previously noted, it stands alone in holding the Brady Act within congressional power.¹⁷ Its effort to map the "unsteady path" of Tenth Amendment precedent reaches beyond gun control legislation and implicates the ability of the federal government to implement national solutions to nationwide problems. This comment explores the continuum analysis of Tenth Amendment jurisprudence developed and applied in *Koog*. Particular scrutiny is given to

8. 854 F. Supp. 1503 (D. Mont. 1994).

9. 505 U.S. 144 (1992).

10. *Printz*, 854 F. Supp. at 1513.

11. 852 F. Supp. 1376 (W.D. Tex. 1994).

12. *Id.* at 1381.

13. *Id.*

14. *Id.* at 1381-88; see also *New York v. United States*, 505 U.S. 144 (1992); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

15. 456 U.S. 742 (1982).

16. *Koog v. United States*, 852 F. Supp. 1376, 1388 (W.D. Tex. 1994).

17. See *supra* notes 3-4 and accompanying text.

its treatment of *New York v. United States* and the distinctions drawn among prior decisions.¹⁸ Ultimately, this comment rejects the continuum model in favor of a two-stage analysis, distinguishing between discrete tenets of state autonomy and state immunity.¹⁹

Part II of this comment provides a general overview of the constitutional challenges to the Brady Act and the conclusions of two federal district courts on the question of state sovereignty as a limit to congressional power.²⁰ The section also defines the continuum approach adopted in *Koog* and reviews the key holdings of the Supreme Court relied upon in that opinion.²¹

Part III analyzes the Court's Tenth Amendment jurisprudence over the past two decades and identifies two underlying principles of federalism which have generated much confusion.²² These principles are then distinguished and applied to the challenged portion of the Brady Act.²³ Ultimately, *Koog* is criticized as based on an improperly narrow reading of *New York v. United States*, and its definition of the continuum model is rejected.²⁴

Part IV proposes that *Koog v. United States* be overruled on appeal because the trial court incorrectly defined and applied the continuum model.²⁵ It advocates a clear restatement of the nature of Tenth Amendment restrictions on congressional power, and proposes a model restatement, with a two-step inquiry process.²⁶

II. BACKGROUND

A. *The Context of the Brady Law*

Violent crime is a serious and ongoing concern in American society.²⁷ The decade ending in 1992 witnessed enor-

18. See discussion *infra* part III.C.

19. See discussion *infra* part IV.

20. See discussion *infra* part II.A-D.

21. See discussion *infra* part II.E.

22. See discussion *infra* part III.A-B.

23. See discussion *infra* part III.C.

24. See discussion *infra* part III.C.2.

25. See discussion *infra* part IV.

26. See discussion *infra* part IV.

27. Over 1.9 million violent crimes were reported to law enforcement officials in the United States during 1992. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 11 (1992).

mous increases in all forms of personal violence.²⁸ Handguns were the weapon of choice in over fifty-five percent of the more than 22,000 murders recorded in 1992.²⁹ Firearms were also used in forty percent of robberies³⁰ and twenty-five percent of aggravated assaults reported during that period.³¹ Such statistics document upward trends in both general violence and handgun use, but the problems they expose are not new.

In 1991, the House Committee on the Judiciary noted equally "cold, stark figures" in its report on the Brady Handgun Violence Prevention Act.³² Within those figures, one particular event — the 1981 attack on President Ronald Reagan by John Hinkley, Jr. — was cited as the root of efforts to establish national regulations on handgun sales.³³ Former Press Secretary James Brady was severely wounded in the attack and, subsequently, became a national spokesperson for the movement.³⁴ Whether motivated by the individual tragedy of James Brady or public pressure to break the siege of violence in America, Congress responded in 1993 by passing public law 103-159, known popularly as the Brady Handgun Violence Prevention Act.³⁵

B. *The Content of the Brady Law*

Public law 103-159 is an amendment to the Gun Control Act of 1968 which regulated the manufacture and distribution of firearms.³⁶ The amendment calls for the eventual implementation of a "national instant criminal background

28. Combined reporting for all violent offenses increased 54% over 1983 reporting levels. *Id.*

29. *Id.* at 18. Handguns were used in 12,489 murders during the reporting period. *Id.* By contrast, all other forms of murder totaled only 10,051 for the same period. *Id.*

30. *Id.* at 29.

31. *Id.* at 32.

32. H.R. REP. NO. 47, 102d Cong., 1st Sess. 4 (1991).

33. *Id.*

34. See *Hearing Before Subcomm. on Crime and Criminal Justice*, 102d Cong., 1st Sess. 82 (1991) (statement of James Brady, Handgun Control, Inc.).

35. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (partially codified in various parts of 18 U.S.C. § 922).

36. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended in various sections of 18 & 26 U.S.C.). In 1974, the Supreme Court defined the purpose of the Act as keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background or incompetency." *Huddleston v. United States*, 415 U.S. 814, 825 (1974).

check system" for purposes of verifying that a proposed gun sale does not violate state or federal law.³⁷ Brady also establishes interim measures, imposing a mandatory five day maximum waiting period on handgun sales,³⁸ and requiring a chief law enforcement officer to make "a reasonable effort to ascertain within five business days whether receipt or possession [of a handgun] would be in violation of the law."³⁹ The interim requirements are effective for a maximum of 60 months or until the instant background check system becomes operational.⁴⁰

C. *The Conflict Within the Brady Law*

The interim provisions of the Brady Law have been challenged in several jurisdictions on constitutional grounds.⁴¹ The essence of each attack is that, while Congress holds the power to regulate handgun sales incident to its commerce power, it may not place the burden of regulatory implementation upon state or local officials.⁴² As recently stated by the Supreme Court, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus [requires determination of] . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."⁴³

37. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103, 107 Stat. 1541 (1993). Within 60 months of the date of enactment of the Act, the Attorney General is required to establish an instant check system to be accessed by sellers via telephone or other electronic means. *Id.*

38. 18 U.S.C. § 922(s)(1)(A)(ii)(I) (1993).

39. 18 U.S.C. § 922(s)(2) (1993).

40. 18 U.S.C. § 922(s)(1) (1993).

41. See *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

42. See, e.g., *Printz v. United States*, 854 F. Supp. 1503, 1512 (D. Mont. 1994).

43. *New York v. United States*, 505 U.S. 144, 157 (1992).

D. *The Courts' Conclusions Regarding the Brady Law*

1. *Printz v. United States: Mandatory Background Check is Unconstitutional*

a. *Printz's Claim*

The United States District Court for the District of Montana was the first to rule on the constitutionality of the Brady Law.⁴⁴ Jay Printz, the Sheriff of Ravalli County, Montana, brought suit against the United States, seeking a declaratory judgment that provisions of the Brady Act were unconstitutional.⁴⁵ He also requested a permanent injunction "on the ground that its commands to [chief law enforcement officers] are beyond the powers delegated to Congress by the United States Constitution, article 1, section 8, and violate the Tenth Amendment to the Constitution."⁴⁶

As chief law enforcement officer (CLEO) for the region, Sheriff Printz argued that the law's interim provisions mandate some form of background check each time notice of a proposed handgun transfer is submitted by a transferor.⁴⁷ Additionally, when the results of the search indicate that a proposed handgun transfer would not violate state or federal law, the CLEO is directed to destroy, within twenty days, any records pertaining to the transfer.⁴⁸ Should the investigation indicate that the proposed transfer would violate the law, the CLEO is obligated to notify the transferor that the transfer is unlawful and, upon request by the transferee, to provide written explanation for the determination.⁴⁹ Such mandatory procedures would require the Sheriff to divert limited departmental resources from local activities to implement federal law.⁵⁰ Sheriff Printz also contended that violation of the provisions would subject him to criminal penalties under section 924(a)(5) of the Act.⁵¹

44. *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

45. *Id.* at 1506.

46. *Id.*

47. *Id.* at 1510-11.

48. *Id.* See generally 18 U.S.C. § 922(s)(6)(B) (1993).

49. *Printz v. United States*, 854 F. Supp. 1503, 1510-11 (D. Mont. 1994). See generally 18 U.S.C. § 922(s)(6)(C) (1993).

50. *Printz*, 854 F. Supp. at 1511.

51. *Id.* at 1509.

The United States argued that the background checks were not mandatory.⁵² A CLEO was only required to determine whether the check was a reasonable expenditure of resources.⁵³ Thus, the provision was discretionary and did not violate the Tenth Amendment.⁵⁴

b. *The Court's Analysis*

The court first turned to the task of statutory interpretation.⁵⁵ Plaintiff's contention that the statute's criminal sanctions applied to non-compliant CLEOs was determined to lack merit.⁵⁶ While the plain language of the Act was "unclear on this point," the legislative intent demonstrated that CLEOs were not subject to criminal penalties for violations of the Act.⁵⁷ The legislative history of the Act,⁵⁸ its specific exemption of CLEOs from civil damages,⁵⁹ and the rule of lenity⁶⁰ all led the court to conclude that the criminal provisions were inapplicable to CLEOs.⁶¹

Although the force of criminal sanctions was lacking, the court determined that the challenged provisions did, nonetheless, mandate that CLEOs perform background checks.⁶² The legislative history was persuasive once again, as references were found "[t]hroughout the House Judiciary Committee Report" pertaining to the "mandatory nature of . . . the

52. *Id.* at 1511.

53. *Id.*

54. *Printz v. United States*, 854 F. Supp. 1503, 1510-11 (D. Mont. 1994)

55. Prior to reaching the constitutional issue, the court examined questions of standing and capacity to sue, finding that Plaintiff had a sufficient interest in the outcome of the litigation to confer standing and held an "inherent right to bring this suit" co-extensive with his public duties. *Id.* at 1507-09.

56. *Id.* at 1510.

57. *Id.* at 1509-10.

58. The court noted that an earlier version of the Act, which did not require CLEOs to make reasonable efforts to determine the legality of a gun sale, contained the criminal sanctions at issue. *Id.* at 1510. Silence in the legislative history of the subsequent version led the court to conclude that Congress did not intend to apply the sanctions to CLEOs. *Id.*

59. Since the Act exempted CLEOs from civil liability, the court considered exposure to more severe criminal penalties "incongruous." *Printz v. United States*, 854 F. Supp. 1503, 1510 (D. Mont. 1994).

60. The lenity rule provides that "ambiguity in the language of a statute concerning multiple punishment . . . should be resolved in favor of lenity in sentencing." BLACK'S LAW DICTIONARY 902 (6th ed. 1990). The court determined that application of the rule in this case would "require[] that the statute be construed to be inapplicable [to CLEOs]." *Printz*, 854 F. Supp. at 1510.

61. *Printz*, 854 F. Supp. at 1510.

62. *Id.* at 1512.

background checks.”⁶³ Further, the plain language of the Report implied that checks would be performed.⁶⁴ The court also noted that a proposed amendment changing the word “shall” to “may” had been rejected by the Judiciary Committee.⁶⁵ Consequently, the court determined that the Brady Law placed three mandatory duties upon CLEOs.⁶⁶

A finding that the CLEO’s tasks were not discretionary forced the court to examine the core of the Plaintiff’s claim—the unconstitutional exercise of power by Congress.⁶⁷ The court asked whether the federal government could enlist state officials to implement a federal regulatory program, and it found its answer in *New York v. United States*, a Supreme Court decision.⁶⁸

[F]rom the plain text of that opinion and the logical conclusion of its analysis, [the] court conclude[d] that the ascertainment/background check provision of the Act exceed[ed] the powers delegated to Congress . . . because it substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program.⁶⁹

63. *Id.* The court cited statements from the Summary and Purpose section (“Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited from buying a gun”), the Brief Explanation of H.R. 1025 section (“The bill requires local law enforcement officials to make a reasonable effort to ascertain whether the prospective purchaser is forbidden from buying the handgun”), and the Section-by-Section Analysis (“This section provides that before a Federal firearms licensee transfers a firearm to a non-licensee, a background check of the prospective purchaser will be conducted”) as clear indications of Congress’ intention that some form of background check be performed each time a handgun was sold. *Id.* (quoting H.R. REP. NO. 344, 103d Cong., 1st Sess. 7, 10-11, 17 (1993)).

64. *Printz v. United States*, 854 F. Supp. 1503, 1512 (D. Mont. 1994).

In the “Summary and Purpose” section is stated, “Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited from buying a gun.” Clearly, a determination of eligibility is required and some form of background check on which to make the determination is implied by this statement.

Id. (citation omitted) (quoting H.R. REP. NO. 344, 103d Cong., 1st Sess. 7 (1993)).

65. *Id.*

66. *Id.* The court held that the Act requires a CLEO to “ascertain whether receipt of a handgun would be in violation of the law; perform a background check; and . . . [either] destroy the statement within twenty days . . . [or] provide the reasons for the determination [that the sale would be unlawful].” *Id.*

67. *Id.*

68. 505 U.S. 144 (1992).

69. *Printz v. United States*, 854 F. Supp. 1503, 1513 (D. Mont. 1994).

Thus, within the *New York* analysis, the court found two separate bases for holding the Act unconstitutional: (a) its effect on state executives, and (b) its effect on the state legislatures.

The first basis originated from the principle that local officials should not be held accountable for unpopular policies forced upon them which affect their ability to address local concerns.⁷⁰ The second reflected awareness that any regulatory program bears costs which must be absorbed by the state. Since the legislature will be faced with the choice between raising taxes to fund the program, diverting funds from other programs, or leaving the responsible department under-funded, the law indirectly mandates some potentially unpopular action by state legislators.⁷¹

The court concluded that the mandatory background check requirement, though unconstitutional, was severable from the remainder of the legislation.⁷² Consequently, transferees are still required to execute sworn statements which transferors must forward to CLEOs.⁷³ The CLEO, then, may elect to conduct a check or destroy the statement within twenty days.⁷⁴

70. *Id.* at 1514-15. Justice O'Connor elaborated further on the principle of accountability in *New York*:

If the citizens of New York, for example, do not consider [regulation] in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in the view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.

New York v. United States, 505 U.S. 144, 168-69 (1992).

71. *Printz*, 854 F. Supp. at 1515.

72. *Id.* at 1519.

73. *Id.* at 1518.

74. *Printz v. United States*, 854 F. Supp. 1503, 1518 (D. Mont. 1994).

2. *Koog v. United States: Mandatory Background Check is Constitutional*

Two weeks after *Printz* was decided, a second opinion was rendered on the constitutionality of the Brady Law.⁷⁵ The facts and legal issues of *Koog v. United States* were virtually indistinguishable from *Printz*.⁷⁶ The court's reasoning and result, however, differed dramatically. *Koog* noted that the Supreme Court decisions regarding the Tenth Amendment "reflect a series of shifting perspectives on the nature and breadth of the powers reserved to the states Faced with arguably contradictory precedents, [the] court has no better guide than simply to align the principles enunciated in these cases on a continuum and decide where the instant case falls."⁷⁷

The continuum developed by the court drew upon seven Supreme Court decisions spanning nearly twenty years.⁷⁸ One extreme, identified as Justice Brennan's dissent in *National League of Cities v. Usery*,⁷⁹ was characterized as suggesting that state sovereignty provided no independent limit on congressional power.⁸⁰ The Tenth Amendment did no more than limit Congress to enumerated powers, and protection of sovereignty interests resided within the political process rather than the judiciary.⁸¹ The continuum's opposite extreme was identified in *New York v. United States*.⁸² This position characterized the Tenth Amendment as "express[ing] a concept of state sovereignty that independently limits the Congressional exercise of the commerce power."⁸³

75. *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994).

76. Plaintiff brought suit in his official capacity as Sheriff of Val Verde County, Texas, seeking a declaration that 18 U.S.C. § 922(s) violates the Tenth Amendment, and seeking a permanent injunction against its enforcement. *Id.* at 1377-78.

77. *Id.* at 1381.

78. See *New York v. United States*, 505 U.S. 144 (1992); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

79. 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

80. *Koog v. United States*, 852 F. Supp. 1376, 1381-82 (W.D. Tex. 1994).

81. *Id.* at 1382.

82. 505 U.S. 144 (1992).

83. *Koog*, 852 F. Supp. at 1387.

Between these conflicting views was placed a myriad of opinions, concurrences, and dissents, suggesting that the Tenth Amendment places some restraints on congressional power, particularly with respect to "‘integral operations,’ ‘typical’ or ‘sovereign’ functions, or more than ‘de minimus’ intrusions."⁸⁴

Koog determined that the Brady Law conferred great discretion on the CLEO because it required only a reasonable background search under the circumstances; in some instances, a decision to conduct no search at all might be warranted.⁸⁵ Thus, the court determined the facts most closely resembled those of *FERC v. Mississippi*,⁸⁶ where the minimal intrusion of a federal regulation requiring states to consider federal standards when adopting utility regulations was ruled constitutional.⁸⁷ Consequently, the court held the Brady Act consistent with the Constitution, "even though it places some minimal duties upon state law enforcement officials."⁸⁸

E. *The Continuum Explored*

As previously noted, *Koog* derived its continuum model from the opinions of seven Supreme Court cases.⁸⁹ Those decisions embody the modern views and approaches of the Court to the question of state sovereignty as a limit on federal power. This section will examine each of those cases, beginning with *National League of Cities v. Usery*.⁹⁰

1. *National League of Cities v. Usery: A Doctrine of Governmental Immunity Defined*

In 1976, the Court considered whether an amendment to the Federal Labor Standards Act which extended its wage and hours provisions to state and local government employees, was a valid exercise of authority under the Commerce Clause.⁹¹ In a 5-to-4 decision, the majority struck down the

84. *Id.*

85. *Koog v. United States*, 852 F. Supp. 1376, 1388 (W.D. 1994).

86. 456 U.S. 742 (1982).

87. *Koog*, 852 F. Supp. at 1388.

88. *Id.*

89. See *supra* note 14 and accompanying text.

90. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

91. *Id.* A 1974 amendment to the Fair Labor Standards Act modified its definition of "employer" to include public agencies. *Id.* at 838. The amendment

amendment, holding that Congress may not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁹² The Court recognized that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."⁹³ The limits imposed by such attributes, however, were characterized as flexible enough to allow for "temporary enactments tailored to combat a national emergency."⁹⁴

Justice Brennan, in his dissent, noted that external restraints on Congress' plenary power have long been believed to reside in the political, rather than judicial process.⁹⁵ Fundamental to the dissent was the principle that, where Congress acts within its legitimate power, the Nation and the States are not co-equals.⁹⁶ Precedent dictated that the proper role for the Court was limited to determining whether the law was a reasonable regulation of commerce.⁹⁷ Brennan characterized the majority opinion as "a catastrophic judicial body blow at Congress' power under the Commerce Clause."⁹⁸

2. Hodel v. Virginia Surface Mining & Reclamation Ass'n: *An Immunity Test Refined*

In 1981, the Court ruled on challenges to the Surface Mining Control and Reclamation Act of 1977.⁹⁹ After holding

also defined "public agency" to include "the Government of the United States; the government of a State or political subdivision thereof" or any agency of those entities. *Id.* The amendment served to eliminate the general exemption afforded by the original Act to States and their political subdivisions. *Id.* Thus, almost all public employment was subject to the terms of the Act governing minimum wage and maximum hour requirements. *Id.* at 839.

92. *Id.* at 852.

93. *Id.* at 845.

94. *Id.* at 853.

95. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 857-58 (1976) (Brennan, J., dissenting), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

96. *Id.* at 859-60.

97. *Id.* at 861.

98. *Id.* at 880.

99. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). The Act established a two-phase program for regulating surface mining activities, and it created various national performance standards designed to guard societal and environmental interests against the adverse effects of surface coal mining operations. *Id.* at 268-69. Plaintiffs (an association of coal

that the Act was a legitimate exercise of commerce power, the Court turned to the question of affirmative limits on that power.¹⁰⁰ The district court had invalidated certain provisions on the ground that they violated the Tenth Amendment and interfered with the traditional governmental function of regulating land use.¹⁰¹

The Supreme Court reversed and announced a three-part test for determining whether legislation was invalid under *National League of Cities*: (1) the challenged legislation must regulate the States as States; (2) the regulation must address an indisputable attribute of state sovereignty; and (3) compliance must directly impair the State's ability to structure integral operations in areas of traditional governmental functions.¹⁰² A footnote to the opinion suggests that, even when the requirements of the test are satisfied, a balancing of state and federal interests may be required.¹⁰³

The challenged provisions failed to satisfy the requirements of the test because they did not directly regulate the States; the provisions were targeted at individual businesses and, to the extent that any State action was implicated, States remained free to conform with federal regulation or be preempted by federal law.¹⁰⁴ *Hodel*, rendered without dissent, marked a rare moment of general agreement in the struggle between the Tenth Amendment and the Commerce Clause.

3. FERC v. Mississippi: *The Alternative Approach of "Choice"*

One year after *Hodel*, the Court considered the constitutionality of legislation implemented in response to a national

producers, several member companies, four landowners, the Commonwealth of Virginia, and one town) sought injunctive and declaratory relief against the Act on grounds that its provisions violated the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Tenth Amendment, and the Just Compensation Clause of the Fifth Amendment. *Id.* at 273.

100. *Id.* at 283.

101. The district court issued a permanent injunction against enforcement of the Act, relying on the language of *National League of Cities* to find that the Act violated the Tenth Amendment because it displaced State power to structure "integral operations in areas of traditional functions." *Id.* at 274.

102. *Id.* at 287-88.

103. *See id.* at 288 n.29.

104. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

energy crisis.¹⁰⁵ Provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA) were challenged by the State of Mississippi on the grounds that they were "beyond the scope of congressional power under the Commerce Clause and . . . constituted an invasion of state sovereignty in violation of the Tenth Amendment."¹⁰⁶ The majority opinion upheld the provisions, finding that Congress may place procedural requirements upon States as a prerequisite to continued activity in an otherwise preemptable field.¹⁰⁷ "[B]ecause the two challenged Titles simply condition[ed] continued state involvement in a pre-emptible [sic] area on the consideration of federal proposals, they d[id] not threaten the States' 'separate and independent existence,' . . . [or] impair the ability of the States 'to function effectively in a federal system.'"¹⁰⁸

In dissent, Justice O'Connor urged application of the *Hodel* three-part test to invalidate the provisions.¹⁰⁹ The majority's "choice" approach was characterized as "an absurdity," which removed all limits to federal regulation of state government since a State could always be presented with a choice between conformity and preemption.¹¹⁰ Justice O'Connor viewed the conscription of "state utility commissions into the national bureaucratic army" as contrary to the principles of *National League of Cities v. Usery*, the values of federalism, and constitutional history.¹¹¹

4. EEOC v. Wyoming: *The Immunity Test Applied*

In 1983 the Court, once again, examined the question of state sovereignty as a limitation of commerce power.¹¹² A 1974 amendment to the Age Discrimination in Employment

105. *FERC v. Mississippi*, 456 U.S. 742 (1982).

106. *Id.* at 752. PURPA required state enforcement of standards promulgated by the Federal Energy Regulatory Commission (FERC) and it compelled consideration of federal rate-making standards and procedures on state commissions. *Id.* at 759.

107. *Id.* at 771.

108. *Id.* at 765-66 (citations omitted).

109. *Id.* at 778 (1982) (O'Connor, J., dissenting).

110. *FERC v. Mississippi*, 456 U.S. 742, 781-82 (1982). The point was illustrated by reference to the prior decision in *National League of Cities v. Usery*: "Under the Court's analysis, for example, *National League of Cities v. Usery* would have been wrongly decided, because the States could have avoided the Fair Labor Standards Act by 'choosing' to fire all employees subject to that Act and to close those branches of state government." *Id.* (citation omitted).

111. *Id.* at 775.

112. *EEOC v. Wyoming*, 460 U.S. 226 (1983).

Act of 1967 (ADEA) extended its prohibitions on age discrimination to State and Federal Governments.¹¹³ The Equal Employment Opportunity Commission (EEOC) brought suit on behalf of a supervisor for the Wyoming Fish and Game Department who had been involuntarily retired at the age of 55.¹¹⁴ The district court's holding that the "Act violated the doctrine of Tenth Amendment immunity articulated in *National League of Cities v. Usery*"¹¹⁵ was reversed by the Supreme Court.¹¹⁶

The 5-to-4 decision, applying the three prong analysis of *Hodel*, acknowledged that the Act plainly regulated the States as States, but did not "'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.'"¹¹⁷ The Court viewed the question of whether a federal law directly impairs a State's ability to structure integral operations as one of degree.¹¹⁸ Since the State's only interest in the retirement policy was assuring the physical capabilities of game wardens, and the ADEA would not impair that objective, the majority found the intrusion "sufficiently less serious than . . . *National League of Cities* so as to make it unnecessary . . . to override Congress' express choice to extend its regulatory authority to the States."¹¹⁹

113. *Id.* at 233. The Act prohibited discrimination against any employee or potential employee on the basis of age except where age was a bona fide occupational qualification reasonably necessary for the normal operation of the business. *Id.* at 228-29; see also 29 U.S.C. § 623 (1992).

114. *Wyoming*, 460 U.S. at 234-35.

115. *Id.* at 235.

116. *Id.* at 243-44.

117. *EEOC v. Wyoming*, 460 U.S. 226, 237-39 (1983). The second prong of the *Hodel* test, requiring that the statute address an "undoubted attribute of state sovereignty," was not reached because the third prong proved decisive. *Id.* at 238-39. However, an important footnote to the opinion elaborated on the nature of the employment relationship stating:

A State's employment relationship with its workers can, under certain circumstances, be one vehicle for the exercise of its core sovereign functions. . . . [S]ome employment decisions are so closely connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment. But we are not to be understood to suggest that every state employment decision aimed simply at advancing a generalized interest in efficient management — even the efficient management of traditional state functions — should be considered to be an exercise of an "undoubted attribute of state sovereignty."

Id. at 238 n.11 (citations omitted).

118. *Id.* at 239.

119. *Id.*

In his concurrence, Justice Stevens urged that *National League of Cities v. Usery* was improperly decided and should be reversed.¹²⁰ Nothing in the Tenth Amendment, or elsewhere in the Constitution, supported a "judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause."¹²¹ This case, like *National League of Cities*, involved no more than an attempt by Congress to regulate all segments of the national labor market — an act squarely within the settled scope of the commerce power.¹²² The views of Justice Stevens would prove persuasive when the Court next examined the question of sovereign immunity.¹²³

5. *Garcia v. San Antonio Metropolitan Transit Authority: The Immunity Test Discarded*

Four months after the Court decided *National League of Cities*, the San Antonio Transit Authority notified its employees that it was exempt from overtime obligations under the Fair Labor Standards Act (FLSA).¹²⁴ The organization's successor, San Antonio Metropolitan Transit Authority (SAMTA), was subsequently notified by the Department of Labor that its operations were not immune from application of the Act.¹²⁵ SAMTA filed suit against the Secretary of Labor, seeking a declaratory judgment that *National League of Cities* precluded application of the Act's overtime provisions to SAMTA operations.¹²⁶ The District Court entered judgment for SAMTA, holding that public mass-transit fell within the traditional government functions exempted by *National League of Cities*.¹²⁷ In reversing, the Supreme Court used the

120. *Id.* at 249-50 (Stevens, J., concurring).

121. *Id.* at 248.

122. *EEOC v. Wyoming*, 460 U.S. 226, 247-48 (1983).

123. See discussion *infra* part II.E.5.

124. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 534 (1985).

125. *Id.*

126. *Id.* The District Court allowed Garcia, a SAMTA employee, to intervene as a defendant after staying a civil action for unpaid overtime wages due under the FLSA. *Id.*

127. *Id.* at 535-36. The district court first granted summary judgment for Plaintiff, from which appeal was taken to the Supreme Court. *Id.* at 535. During the pendency of that appeal, the Supreme Court decided *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982), which held that a state-owned railway was not a traditional governmental function. *Id.* Consequently, the district court's judgment was vacated and the case remanded for further consid-

opportunity to reconsider and reject the principles set forth in *National League of Cities v. Usery*.¹²⁸

A sharply divided Court "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" ¹²⁹ The Court confirmed that there are limits on the power of the federal government to interfere with state functions.¹³⁰ But such limits are to be found in the political process — each state's participation in federal governmental action.¹³¹

[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."¹³²

The Court declined, however, to elaborate further on the nature of any affirmative limits the constitutional structure might impose on Commerce Clause power.¹³³

Justice Powell, in his dissent, found no justification for departing from *stare decisis* and would have applied the standard of *National League of Cities*.¹³⁴ He argued that the majority's opinion "effectively reduce[d] the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."¹³⁵ The *National League of Cities* test was characterized as a balancing test which required weighing of state and federal interests.¹³⁶ The financial impact and displacement of state control over employees created a compel-

eration. *Id.* On rehearing, the court again ruled in favor of SAMTA and appeal was taken to the Supreme Court. *Id.* at 535-36.

128. *Id.* at 546-47.

129. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 534 (1985).

130. *Id.* at 547.

131. *Id.* at 556.

132. *Id.* at 554.

133. *Id.* at 556.

134. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 559 (1985) (Powell, J., dissenting).

135. *Id.* at 560.

136. *Id.* at 562, 563 n.5.

ling state interest which justified application of the doctrine of sovereign immunity.¹³⁷

In a separate dissent, Justice O'Connor noted that "[t]he true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."¹³⁸ Although definition of the scope of state autonomy has proven difficult, she remained convinced that it is the Court's duty to reconcile the concerns of federalism and commerce power when they conflict.¹³⁹ Justice O'Connor echoed Justice Rehnquist's confident assertion that the Court would, one day, reassume its constitutional duty.¹⁴⁰

6. South Carolina v. Baker: *The "Political Process" Protects State Sovereignty*

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) removed the federal income tax exemption for interest earned on long-term state and municipal bonds issued in unregistered form.¹⁴¹ The State of South Carolina brought an original jurisdiction action in the Supreme Court, challenging section 310(b)(1) as constitutionally invalid under the Tenth Amendment.¹⁴² Although the Act merely eliminated tax-exempt status from unregistered bonds, the practical effect of which was to prohibit states from issuing unregistered securities, the Court approached the Tenth Amendment claim as though the Act were an outright ban on issuance of bearer bonds.¹⁴³

Though the Court noted that *Garcia* "left open the possibility that some extraordinary defects in the national political

137. *Id.* at 578.

138. *Id.* at 581 (O'Connor, J., dissenting).

139. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 589 (1985).

140. *Id.*

141. 26 U.S.C. § 103(j)(1) (1982). So-called "bearer bonds" were perceived to be a significant vehicle for tax evasion and other illegal activities; see *Hearings on H.R. 6300 Before the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 35 (1982) (testimony of John Chapoton, Assistant Secretary of the Treasury for Tax Policy).

142. *South Carolina v. Baker*, 485 U.S. 505 (1988). The Court appointed a Special Master who conducted hearings, determined that the challenged provision was constitutional, and recommended entering judgment for the defendant. *Id.* at 510-11. South Carolina filed exceptions to the factual findings and legal conclusions submitted by the Special Master. *Id.* at 511.

143. *Id.*

process might render congressional regulation of state activities invalid under the Tenth Amendment," it declined to further define the nature of such defects.¹⁴⁴ The State's argument that the statute was passed by "an uninformed Congress relying upon incomplete information," simply failed to allege a defect in the operation of the national political process.¹⁴⁵ The Court also found that the Act did not commandeer the state legislative and administrative process, because it merely subjected the States to generally applicable federal regulations.¹⁴⁶ The fact "[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity . . . present[ed] no constitutional defect."¹⁴⁷

In a separate concurrence, Justice Scalia questioned the Court's reading of *Garcia*.¹⁴⁸ That holding did not establish the national political process as the States' only constitutional protection against congressional overreach, nor did it mandate "the demonstration of 'some extraordinary defect' in the operation of that process [to] justify judicial relief."¹⁴⁹ Justice Scalia also agreed with Chief Justice Rehnquist that the opinion unnecessarily cast doubt upon *FERC v. Mississippi*.¹⁵⁰

7. New York v. United States: *The "Constitutional Structure" Protects State Sovereignty*

In 1990, the State of New York brought suit against the United States, seeking a declaratory judgment that provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 were inconsistent with the Constitution.¹⁵¹

144. *Id.* at 512.

145. *Id.* at 512-13 (quoting Brief for Plaintiff at 101).

146. *Id.* at 513-15. The Court further noted "[t]he extent to which the Tenth Amendment claim left open in *FERC* survives *Garcia* or poses constitutional limitations independent of those discussed in *Garcia* is far from clear." *Id.* at 513.

147. *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988).

148. *Id.* at 528 (Scalia, J., concurring).

149. *Id.*

150. *Id.* Both Justices believed that the case could be resolved without reference to *FERC*. *Id.* Thus, the Court's stated uncertainty as to whether *FERC* survived the decision in *Garcia* was better left unaddressed. *Id.*; see also *id.* at 529-30 (Rehnquist, C.J., concurring).

151. *New York v. United States*, 505 U.S. 144 (1992). The Act had been passed in the face of a looming crisis in radioactive waste disposal. *Id.* at 152-54. A 1980 Act had authorized the formation of regional disposal compacts

The Act, based upon a proposal submitted by the National Governors' Association, mandated that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State."¹⁵² It also authorized the States to enter into interstate compacts for establishment and operation of regional disposal facilities, and established a timetable for restricting access to existing disposal sites.¹⁵³ To encourage state compliance with deadlines, the Act provided three kinds of incentives: (1) monetary incentives were available to States achieving certain milestones; (2) access incentives, in the form of escalated surcharges and denial of access of existing sites, were available as sanctions against States failing to meet milestones; (3) title incentives obligated a non-compliant State to take title to, and full liability for, all waste generated within its borders as soon after January 1, 1996, as the generator notifies the State that the waste is available for shipment.¹⁵⁴

The Court found the take title incentives "inconsistent with the federal structure of our Government established by the Constitution."¹⁵⁵ Whether viewed as exceeding the enumerated powers of Congress or as violating the state sovereignty reserved by the Tenth Amendment, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."¹⁵⁶ The Tenth Amendment contains no textual restraint on congressional power, but it

which, beginning in 1986, would be authorized to restrict access of non-members to disposal sites. *Id.* As a consequence, 31 states faced the prospect of having no outlet for disposal of waste generated within their borders. *Id.*

152. *Id.* (alteration in original).

153. *Id.* The States in which existing disposal sites were located were authorized to assess a graduated surcharge on waste arriving from outside the regional compact. *Id.* At the end of the seven year transitional period, the States would be allowed to exclude waste generated by non-member States. *Id.*

154. *Id.*

155. *Id.* at 177. The monetary incentives were upheld as a legitimate exercise of congressional power to authorize state burdening of interstate commerce via surcharge; to lay tax upon the surcharges collected by the States; to condition receipt of federal funds on compliance with achievement of statutory milestones. *Id.* at 171-73. The access incentives were upheld as conditional exercises of commerce power authorizing the burdening of interstate commerce. *Id.* at 173-74.

156. *New York v. United States*, 505 U.S. 144, 188 (1992). The Court viewed the question of whether the Act exceeded the scope of congressional power or violated the Tenth Amendment as two phrasings of the same question. *Id.* at 155-56.

confirms that some powers are reserved to the States, and it directs inquiry into whether a particular "incident of state sovereignty is protected by a limitation on an Article I power."¹⁵⁷ One such limitation is found in the framework of federalism set forth in the Constitution.¹⁵⁸

The title incentive offered states a choice between regulating in accord with the terms of the Act, or accepting title to, possession of, and liability for radioactive waste generated within their borders.¹⁵⁹ However, the Court viewed both choices as "unconstitutionally coercive regulatory techniques," which provided no real choice at all.¹⁶⁰

The Court rejected the United States' argument that a sufficient federal interest could overcome the "Constitution's prohibition of congressional directives to state governments."¹⁶¹ Although noting that prior decisions had acknowledged the balancing of federal and state interests in cases subjecting state governments to generally applicable federal laws, the Court stated:

No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.¹⁶²

In a case like this one, involving the division of authority between federal and state governments, the two inquires are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

Id.

157. *Id.* at 157.

158. *Id.* at 157-59.

159. *Id.* at 174-75.

160. *Id.* at 176. "Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

161. *New York v. United States*, 505 U.S. 144, 177 (1992).

162. *Id.* The Court also rejected arguments that the Constitution permits federal directives to state governments in some circumstances, *id.* at 177-80, and that Congress holds a power to resolve interstate commerce disputes analo-

In his dissent, Justice White asserted that New York had fully participated in the negotiations which led to the Act, took various actions in compliance with its requirements, reaped its full benefit, and "should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its bargain."¹⁶³ The dissent also challenged the Court's distinction between statutes regulating states and those generally applicable to private parties as unsupported by recent Tenth Amendment cases.¹⁶⁴ Justice White believed the appropriate test to apply was the political process analysis of *Garcia*, and here, the State actively participated in that process and could claim no defect.¹⁶⁵

F. *The Koog Perspective: A Continuum of Precedents*

Koog v. United States relied heavily upon the holdings of the preceding cases, yet found no clear answer to the question of whether Congress can mandate acts by state officials pursuant to federal regulations.¹⁶⁶ "After reviewing the Supreme Court's recent decisions, this Court concludes that no single decision controls the entire spectrum of Tenth Amendment analysis. Opinions such as *New York*, *Garcia*, and *FERC* all exist side by side as precedents binding on this court."¹⁶⁷ The *Koog* court viewed "the various and arguably contradictory precedents" as "a series of shifting perspectives on the nature and breadth of the powers reserved to the states under the Tenth Amendment[,] leaving lower courts with few concrete principles to decide cases."¹⁶⁸ The following section analyzes that body of "contradictory" precedent and applies its underlying principles to challenged provisions of the Brady Law.

gous to that of the Court's power to resolve conflicts between states, *id.* at 179-80.

163. *Id.* at 198-99 (White, J., concurring in part and dissenting in part).

164. *Id.* at 201-02.

165. *Id.* at 205-06.

166. *Koog v. United States*, 852 F. Supp. 1376, 1387 (W.D. Tex. 1994).

167. *Id.*

168. *Id.* at 1381.

III. ANALYSIS

Recent Tenth Amendment jurisprudence of the Supreme Court has generated confusion and substantially different interpretations among the lower courts.¹⁶⁹ Such consequences, however, are not surprising given the difficulty the Court has experienced in identifying the source and nature of state sovereignty.¹⁷⁰ Over the past two decades, phrases such as regulating "States as States,"¹⁷¹ "integral operations,"¹⁷² "traditional governmental functions,"¹⁷³ "failings in the national political process,"¹⁷⁴ and "commandeer[ing state] legisla[tures]"¹⁷⁵ have each been used to mark the state-federal border.

Such language has also served to obscure the fact that state sovereignty — as embodied in the Tenth Amendment — consists of two distinct and analytically separate principles: state autonomy and state immunity. The Court has not been blind to this distinction; decisions have incorporated the difference within their analytic approaches.¹⁷⁶ But the failure

169. Compare *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994) (finding plain text and logical conclusions of *New York v. United States* controls) with *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (rejecting "broad" reading of *New York v. United States* on same question).

170. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision) (holding that application of Fair Labor Standards Act to state employees does not violate Tenth Amendment) with *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision) (holding that application of Fair Labor Standards Act to state employees is prohibited by Tenth Amendment), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

171. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

172. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

173. *Id.*

174. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

175. See *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

176. Compare *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not require States to enact or administer a federal regulatory program) with *Nat'l League of Cities v. Usery*, 426 U.S. 833, 857-58 (1976) (Brennan, J., dissenting) (amending generally applicable regulation, which operates to displace State's ability to structure integral operations in areas of traditional governmental functions, is beyond congressional authority), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). But cf. *FERC v. Mississippi*, 456 U.S. 742 (1982) (holding that Congress may re-

to articulate the distinction has left courts, such as *Koog*, uncertain as to the organizing principles underlying modern Tenth Amendment jurisprudence.¹⁷⁷

A. *Autonomy: A Tenet of Political Independence*

The political independence and right of self-government belonging to the States, as States, is so fundamental to the concept of federalism as to require little elaboration. The Constitution itself bears witness to the Framers' understanding that the States would continue to exist as separate political entities.¹⁷⁸ Similarly, the language of the Tenth Amendment leaves little room for doubt that the States enjoy a full measure of autonomy: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁷⁹

The Court has offered various interpretations of the Tenth Amendment's scope and meaning. Most recently, in *New York v. United States*, Justice O'Connor stated:

The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the

quire state agency to consider federal regulations and conform to certain procedural minima during deliberation).

177. See *Koog v. United States*, 852 F. Supp. 1376, 1381 (W.D. Tex. 1994). "[T]he cases seem to reflect a series of shifting perspectives on the nature and breadth of the powers reserved to the states under the Tenth Amendment leaving lower courts with few concrete principles to decided cases." *Id.*

178. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . ." U.S. CONST. art. I, § 4, cl. 1 (emphasis added); "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3; see also U.S. CONST. art. I, § 10 (establishing various restrictions on the residual powers of the States); U.S. CONST. art. III, § 2 (extending judicial power to controversies between States, and clearly distinguishing between citizens and States as entities); U.S. CONST. art. IV, § 1 (requiring each State to accord full faith and credit to the public acts, records, and judicial proceedings of every other State); U.S. CONST. art. IV, § 3, cl. 1 (requiring approval of State legislature, as well as Congress, for modifications of territorial borders); U.S. CONST. art. IV, § 4 (securing to each State a guarantee of a republican form of government). This is but a partial list of examples of the separation between state and federal governments established by the Constitution, and the Framers' recognition of the States as autonomous political entities.

179. U.S. CONST. amend. X.

power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.¹⁸⁰

Thus, the line between state and federal power can be viewed as either a limit on federal power, or a zone of state autonomy protected by the Tenth Amendment. As characterized in *New York v. United States*, "the two inquiries are mirror images of each other."¹⁸¹

At other times, the Court appears to have disavowed the existence of a doctrine of state autonomy:

The principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to insure that the unique benefits of a federal system in which the States enjoy a "separate and independent existence," not be lost through undue federal interference in certain core state functions.¹⁸²

However, this statement actually reveals the Court's awareness of the distinction between the discrete principles. *National League of Cities* was a case involving operation of generally applicable regulations on state functions.¹⁸³ Once the determination is made that *National League of Cities* was an immunity case, the Court's observation that a doctrine of immunity does not "create a sacred province of state autonomy" is logical. Immunity does not create autonomy. Autonomy cases involve only the division of power between state and federal governments, and a violation of state autonomy is an exercise of power not granted to Congress by the Constitution.

B. *Immunity: A Tenet of Protective Limitation*

Some enactments by Congress may be fully within the scope of power granted by the Commerce Clause, yet, when applied to the states, serve to impede the states' ability to function.¹⁸⁴ Thus, while such an act would not implicate the tenet of state autonomy, a zone exists in which states require

180. *New York v. United States*, 505 U.S. 144, 156-57 (1992).

181. *Id.* at 156.

182. *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983) (emphasis added) (citations omitted).

183. See discussion *supra* part II.E.1.

184. For example, in response to a critical and ongoing gasoline shortage, Congress might implement a national program of fuel rationing, incident to its commerce power. But, if applied to the states, such legislation would severely

protection from legitimate exercises of federal power which would undermine their separate and independent existence.

It is this concept of protective immunity which has so frequently troubled the Court. In the words of Justice O'Connor, "[t]he Court's jurisprudence in this area has traveled an unsteady path."¹⁸⁵ Beginning with *National League of Cities*, the Court made repeated efforts to articulate a test for application of the principle.¹⁸⁶ But the task of defining "integral" or "traditional" governmental functions proved unworkable, and the *Garcia* Court finally rejected any test based on judicial appraisals.¹⁸⁷ But even while overruling *National League of Cities*, the *Garcia* Court acknowledged that "undoubtedly there are" limits on the Federal Government's power "to interfere with state functions."¹⁸⁸ Consequently, though the test for such limits remains unclear, the concept of protective immunity is well established. Congress, even through a legitimate exercise of its power, may not impede the States' separate and independent existence.

C. *Application to Brady: A Question of Autonomy or Immunity*

The initial determination required in Tenth Amendment analysis is the nature of the limit on congressional power being claimed by the State. Viewed as a whole, the Brady Act is an unexceptional exercise of commerce power regulating sales of handguns. The Federal Government has been regulating the manufacture and sale of handguns for years.¹⁸⁹ This Act merely amends existing generally applicable regulations to require a nationally standardized waiting period and background check.¹⁹⁰

Thus characterized, the appeal of applying immunity analysis is strong. Unless the Act substantially interferes with the State's separate and independent existence, the reg-

impede their ability to provide adequate essential services, such as police and fire protection.

185. *New York v. United States*, 505 U.S. 144, 160 (1992).

186. See discussion *supra* part II.E.

187. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

188. *Id.* at 547.

189. See, e.g., Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended in various sections of 18 & 26 U.S.C.).

190. See discussion *supra* part II.B.

ulation is within the constitutional power of Congress. Arguably, since many States already have waiting periods and require some form of background check prior to a handgun sale, the case could be made that no substantial interference exists.

Alternatively, the particular regulation challenged may be viewed as federally mandated job duties for state law enforcement officials. As such, they necessarily require a diversion of resources away from other law enforcement activities, and impair the ability of local officials to perform their local duties. Even though the Act confers discretion upon each CLEO to determine what constitutes a reasonable background search under particular circumstances, it was clearly the intent of Congress that some form of search be performed each time a handgun is sold.

The effect is, thus, to commandeer state officials to administer a federal regulatory program — clearly an issue requiring autonomy analysis. An act of Congress which leaves the State no alternative to implementation of a federal program was held unconstitutional in *New York v. United States*.¹⁹¹ So, too, is a statute that affords no alternative to the ongoing administration of a federal regulatory scheme.

As the preceding discussion illustrates, the reach of the Tenth Amendment protection depends upon which analysis is applied. Thus, the initial inquiry — autonomy or immunity — can be decisive of the outcome.

1. *The Koog Decision*

Not surprisingly, *Koog* failed to make an analytic distinction between the tenets of autonomy and immunity. Consequently, the court engaged in a process of fact comparison that led it to conclude that the Brady Law is constitutional “even though it places some minimal duties upon state law enforcement officials.”¹⁹² The court determined that the “great discretion” the Act conferred upon CLEOs, combined with the temporary nature of the duties, more closely resembled the obligations imposed under PURPA in *FERC v. Mississippi*.¹⁹³ Ironically, while the case selected by the court as

191. 505 U.S. 144 (1992).

192. *Koog v. United States*, 852 F. Supp. 1376, 1388 (W.D. Tex. 1994).

193. *Id.*

most similar factually was an autonomy case, the method of selection led the court to apply an immunity analysis instead.

2. *Koog Reconsidered*

The *Koog* court "decline[d] to base its decision on . . . a broad reading of the opinion in *New York*."¹⁹⁴ Even a narrow reading of the opinion, however, suggests a very different outcome. *New York* itself drew a distinction among six of the seven cases relied upon in *Koog*. Describing *National League of Cities v. Usery*,¹⁹⁵ *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁹⁶ *EEOC v. Wyoming*,¹⁹⁷ and *South Carolina v. Baker*,¹⁹⁸ the Court noted:

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. . . . [*New York v. United States*] presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.¹⁹⁹

The comment is noteworthy because the Court clearly distinguishes between immunity and autonomy cases, and indicates that the same analysis does not apply to both. Since the legislation requiring CLEOs to perform background checks cannot be construed to apply to private parties, it follows that the proper analysis to apply to Brady is that which was applied in *New York v. United States* — autonomy analysis.

Consequently, *Koog* has only three autonomy cases to rely upon as precedent: *Hodel*,²⁰⁰ *FERC*,²⁰¹ and *New York* itself. Two of these cases, *Hodel* and *FERC*, failed to find that the challenged statutes had commandeered the legislative processes of the States by compelling them to enact and en-

194. *Id.*

195. 426 U.S. 833 (1976).

196. 469 U.S. 528 (1985).

197. 460 U.S. 226 (1983).

198. 485 U.S. 505 (1988).

199. *New York v. United States*, 505 U.S. 144, 160 (1992) (citations omitted).

200. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). The value of this case as precedent is negligible, however, because it relied, in part at least, on *National League of Cities v. Usery*, which was overruled by *Garcia*. See discussion *supra* part II.E.5. Further, as *National League of Cities* was an immunity case, *Hodel's* reliance on its analysis was misplaced.

201. *FERC v. Mississippi*, 456 U.S. 742 (1982). This case also recognized the distinction between autonomy and immunity. *Id.* at 758-59.

force a federal regulatory program. The reasoning of both, however, was based upon the fact that Congress was regulating in an otherwise preemptable field.²⁰² The challenged statutes merely required States to conform with federal regulations as a prerequisite to continued activity; alternatively, the States could elect to opt out all together.

The statute at issue in the Brady Act offers no similar choice. The statute commandeers law enforcement officials and places mandatory duties upon them.²⁰³ The States are not free to opt out of providing law enforcement. Nor are they free to prevent the sale of handguns within the state. Thus, they face no alternative to administering a federal regulatory program. This factual distinction makes the statute at issue in Brady more egregious than that in either *Hodel* or *FERC*. *New York* was determined to offer States no real choice, and in this crucial analytic aspect, *Koog* is very similar.

A proper reading of *New York v. United States* precludes resort to the continuum analysis relied on in *Koog*. A proper reading, however, requires distinction between the two discrete tenets embodied in the Tenth Amendment. *Koog* is not an immunity case; it is an autonomy case. Inquiries into the nature of the mandatory duties or the state and federal interests involved are not required. As *New York* explained, "[w]hatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."²⁰⁴

D. *Sovereign Immunity: A Two-Part Inquiry*

Perhaps no aspect of Tenth Amendment jurisprudence has contributed so greatly to the judicial confusion as attempts to define and apply the immunity tenet. *National League of Cities v. Usery* established the principle that "amendments [which] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . are not within the author-

202. See *FERC v. Mississippi*, 456 U.S. 742, 765 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-91 (1981).

203. See 18 U.S.C. § 922(s)(2) (1993); see also *supra* text accompanying notes 62-66 & 88.

204. *New York v. United States*, 505 U.S. 144, 188 (1992).

ity granted Congress by Art. I, § 8, cl. 3."²⁰⁵ In other words, sovereign immunity operates to protect the States as States from overreach by the otherwise legitimate exercise of congressional Commerce Clause power.

But immunity is not autonomy. Thus, an initial determination that a case implicates the tenet of sovereign immunity requires a second line of analysis. Attempts to define and apply this line of analysis have, generally, done more harm than good. The Court's first attempt occurred in *Hodel*.²⁰⁶

[A] claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."²⁰⁷

Unfortunately, while *Hodel* refined the immunity test, it was, in actuality, an autonomy case, and was ill-suited for application of its own analysis.

The challenged Act required states to either adopt an environmental protection plan conforming to federal standards, or accept preemption by federal law.²⁰⁸ The federal standards would regulate private actors, but the statute itself could not be characterized as generally applicable legislation. As a consequence of failing at the outset to distinguish the tenets of autonomy and immunity, the Court was first to misapply its own test.²⁰⁹

205. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

206. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

207. *Id.* at 287-88 (emphasis in original) (citations omitted).

208. *See supra* notes 99-104 and accompanying text.

209. The Court indicated that the challenge failed the first part of the test — regulating States as States — because the standards regulated coal mine operators, and States were not compelled to do anything. *Hodel*, 452 U.S. at 288. "If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Id.* Since this Act reflects a conditional preemption of the entire field of surface coal mining, the decision is undoubtedly correct. The analysis is flawed, however, because when the Court speaks of whether a statute compels State action, it invariably refers to the tenet of

Four years later, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court abandoned all efforts to apply the *National League of Cities/Hodel* test.²¹⁰ Attempts to define "traditional governmental functions" had failed to yield any workable organizing principle.²¹¹ Returning to the fundamental structure of federalism, *Garcia* noted that the Framers primarily protected the States through the structure of government and representation in the political process.²¹² But, once again, the Court mixed analyses of immunity and autonomy, and, as a result, discarded a workable test.

The distinction between autonomy and immunity might be expressed as follows: while autonomy requires assessment of the federal authority to act, immunity requires assessment of the act's effect upon the State. It is true that the constitutional structure provides a measure of state sovereignty by securing the States' role in the Federal Government. In essence, this assures state autonomy. It does not follow, however, that representation in the political process will necessarily and adequately protect the States from injury by legitimate exercises of congressional power.

The proper inquiry still must look to the effect of federal action on the State. *National League of Cities* began by looking at the consequences of applying the Fair Labor Standards Act to state employees.²¹³ Since then, the focus has shifted to defining types of functions which qualify for immunity. However, the argument that activity X is a traditional governmental function and, therefore, qualifies for immunity, actually begs analysis under autonomy principles.²¹⁴ Since sovereign immunity serves to protect the state from the effects of otherwise legitimate congressional action, no organizing principle can emerge without reference to the effect of the act on the state function.

autonomy. Thus, the proper focus should have been whether the exercise of power was legitimate. Immunity analysis was not required.

210. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

211. *Id.* at 539.

212. *Id.* at 552.

213. See *supra* notes 91-94 and accompanying text.

214. It may be that activity X is so inherently a function of the State that its regulation is, in actuality, regulation of the State itself. If so, the proper inquiry is into the nature of authority behind the regulation, rather than the nature of the governmental function.

The precise nature of the immunity test remains unclear. *South Carolina v. Baker* suggests that "*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."²¹⁵ However, neither decision offers any insight as to what might constitute a defect in the national political process. At this point it is difficult to imagine the nature of an "extraordinary defect" since, in *Garcia*, mere participation of the States in the structure and process of the Federal Government was considered adequate protection.

It is likely that the *Garcia* standard is no more inviting of definition than was *National League of Cities*. It is certain, however, that the *National League of Cities* standard, with its focus on effects, better serves the concept of sovereign immunity. Ultimately, the proper inquiry must examine the competing interests of both the State and Federal Governments. This analysis cannot be done by simple reference to the adequacy of representation in the political process. Whether defined in the terms of *National League of Cities* or some other interest balancing test, it is clear that a new formulation is needed if the tenet of sovereign immunity is to serve any future constitutional function.

IV. PROPOSAL

Decisions such as *Koog* and *Printz* demonstrate that the lower courts still struggle with application of Tenth Amendment jurisprudence. This is due, in large part, to the Supreme Court's failure to clearly distinguish and articulate the principles it has applied in any particular case. Two decades of mixed analysis and conflicting decisions have so confused the issues as to make a clear, comprehensive statement from the Court imperative. State sovereignty is not a frequently litigated issue. *Koog* affords the Court an opportunity to fully, and finally, define the principles embodied in the Tenth Amendment.

On appeal, the Court should reverse the district court's ruling as an improper reading of *New York v. United States*. The district court failed to recognize the distinction, drawn in *New York*, between cases involving the authority of Congress

215. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

to subject States to generally applicable laws, and those mandating state administration of federal regulations. The requirement that CLEOs perform background checks is a mandatory duty imposed by federal regulation upon state administrative officials. As such, it is inconsistent with the principle announced in *New York v. United States*.

The Court's opinion should fully restate the principles incorporated in the Tenth Amendment and the appropriate tests for determining the constitutional validity of congressional acts.

A proposed model analysis follows, which details the two-part judicial inquiry necessary to ascertain the nature and scope of state sovereignty embodied in the Tenth Amendment, the structure of the Constitution, and the framework of our federal form of government. As an initial matter, a court must distinguish between the two separate and distinct principles which comprise state sovereignty.

A. *State Autonomy: Examine the Exercise of Federal Power*

Sovereign autonomy operates to protect the States as States. It is rooted in the division of powers created by the Constitution. It protects the States from federal legislation which operates directly upon the States in a coercive manner. Autonomy questions may properly be characterized as either an invasion of state sovereignty, or an exercise of congressional power not vested in the Federal Government by the Constitution. In either case, the second inquiry examines the legitimacy of the federal action. A determination that the act was, or was not, a legitimate exercise of federal power concludes the analysis.

B. *State Immunity: Examine the Effect Upon the State*

Sovereign immunity operates to protect the States from the effects of legitimate congressional power. It exempts States from generally applicable laws which would impair their sovereign nature. Since immunity questions involve uses of legitimate congressional authority that are harmful to state sovereignty, the focus of such analysis must consider the effect of the legislation upon the State. Efforts to exempt categories of activities as "traditional" or "essential" state functions are ineffective because they impermissibly trans-

late the immunity inquiry into autonomy analysis. Immunity analysis must always begin with an examination of the effect of a particular statute on a specific state activity.

A second analytic step is required in immunity cases. The relative interests of the State and Federal Governments must be weighed. Not all activities performed by the State will justify immunity from federal regulation. Nor could all federal regulation be justified regardless of its deleterious effect on state functions. Though sovereign immunity exists to protect the States, it is a doctrine of judicially enforced restraint on legitimate congressional power. As such, it must be applied with equal restraint. Applying immunity is proper only where substantial and unavoidable interference with state functions occurs without a compelling federal interest.

V. CONCLUSION

Against the backdrop of the Brady Act, this comment has examined the confusion surrounding the doctrine of state sovereignty. The last two decades of Tenth Amendment jurisprudence have left the courts confused about the nature and scope of state sovereignty limits on congressional power. Even the most recent opinion of the Court led to opposite conclusions when applied to the Brady Act. But the nature of state sovereignty is much larger than gun control. The Tenth Amendment plays an important role in preserving the federal structure of our nation. It assures that the Federal Government does not absorb the separate and independent States through a process of legislative osmosis.

In order for the Tenth Amendment to serve its purpose, it must be an affirmative limiting principle. In its present ill-defined state, it can be neither a boundary marker for Congress nor a protection secured to the States. Only by clarifying the dual tenets of autonomy and immunity — tenets implicit throughout the Court's opinions — can a workable, valuable doctrine be established.

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